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ESSENTIALITY TO PRODUCTION FOR COMMERCE: A CASE STUDY IN STATUTORY INTERPRETATION

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Students in the public law field, in their concentration on constitutional and administrative law, are prone to forget or ignore the very important role played by courts in determining the practical effects of statutes conceded to be constitutional. Through the process of "saying what the law is," courts often are in a position to "legislate," with a great deal of scope allowed their own ideas of the intent of the legislature and the meaning of phrases chosen by legislators.

While the foregoing statements are commonly known to be true, the scholar seldom probes very far behind the self-evident; he makes the observation and lets it go at that. As a consequence, among the "dark continents" of public law (such as lower court studies and state constitutional and administrative law) we find the field of statutory interpretation.

Thus it is that the author has for several years been following a part of the legislative and judicial history of the Fair Labor Standards Act of 1938 (FLSA).[1] Rather than attempt the unwieldy burden of tracing the history of the entire act, he has restricted himself rather arbitrarily to one comparatively minor provision.

Section 3 (j) of the act, in defining those occupations to come under its scope, contained the following phrase:

> . . . for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production . . . [of goods for interstate commerce], in any State.[2]

The immediate question presented by this phrase, obviously, is one of defining *what is necessary to production for commerce.* It is the history of court interpretation of this phrase which is the concern of the present article.

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1. 52 STAT. 1060, 29 U.S.C.A. § 201 *et. seq.* (1938).
2. 52 STAT. 1060, 29 U.S.C.A. § 203(j) (1938), before 1949 amendment.

I.

There seems to have been general agreement, both on the part of the bench and of writers on the subject, that no satisfactory general definition of what is necessary to the production of goods for commerce was possible.

That the Supreme Court and the lower courts, nevertheless, busily —if futilely—engaged in an attempt to make such a definition, was the result of the dictum laid down by Mr. Justice Frankfurter in *Kirschbaum v. Walling*.[3] Frankfurter, after calling such an attempt to define the terms of the statute "like squaring the circle," proceeded to the conclusion that Congress did not mean the words to be interpreted literally; that the phrase must, therefore, be construed in the light of our dual form of government—the implications of which, he said, "cut across what might otherwise be the implied range of the legislation." He then went into the legislative history of the act, and decided that Congress did not intend to enter all the areas which it might constitutionally have occupied —and therefore that the scope of the Act "is not coextensive with the limits of the power of Congress."

The Court, in the *Kirschbaum* case, decided in favor of the coverage of the act, making the Frankfurter dictum merely *obiter*; but its assumptions have been largely followed in succeeding cases and still constitute the ruling interpretation of the act. The validity of the assumption will be briefly discussed later.

In order to ascertain the effect of this dictum, which made it necessary for the courts to examine individually each new case, it is requisite that the relevant decisions be studied. The cases mentioned are only samples of the many questions that have been raised; dozens of others have been denied certiorari or not appealed, leaving the decisions to the lower courts. Denial of certiorari implies, as Pritchett remarks, that the high court sees "no compelling reason to question" the lower court decision.[4]

Kirschbaum v. Walling. The *Kirschbaum* case involved a suit for an injunction to force compliance by the Kirschbaum Company and the Arsenal Building Corporation with the wages and hours provisions of

3. 316 U.S. 517 (1942), decided jointly with Arsenal Building Corp. v. Walling.
4. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 81 (1954).

the FLSA. The companies operated loft buildings in which goods destined for interstate commerce were manufactured by other companies. The suit concerned the employees of the building companies—elevator operators, electricians, etc. In *Kirschbaum,* the injunction had been granted by the District Court and affirmed by the Circuit Court of Appeals. In *Arsenal* the District Court refused to issue the injunction and was reversed by the Circuit Court. As stated above, the Supreme Court affirmed the Circuit Court rulings and the injunctions were issued.

Mr. Justice Frankfurter, in construing "necessary," said that the Court must find that the work of the particular employees concerned has more than a "tenuous" relation to production, thus being in a "fitting sense" necessary to it. The fact that the employers were not the producers made no difference if the work was necessary in the productive process. It was, in other words, the work done by the employee rather than the business of the employer which was to be considered.

Frankfurter's use of the concepts of a "tenuous" relations and of necessity in a "fitting sense" sounds suspiciously similar to the "indirect and direct effect on commerce" arguments used by the Hughes and previous courts and much criticized by Frankfurter himself. Certainly the ideas are no more precise, as Frankfurter himself admitted. What constitutes a mere "tenuous" relation to commerce? The criterion, said the opinion, is one of degree, and does not "draw a mathematical line." Farther on, he averred that the Court must draw lines "where there are no points through which to draw them." Thus the Court found itself drawing the same kind of unreal distinctions it was so vilified for drawing in its conservative battle against the New Deal; the only difference was that the liberal post-1937 Court put the line in a different place.

If we accept Frankfurter's view that Congress did not intend to exercise its full powers, we must agree with Dodd's statement that "the fault is in the Act rather than in the Court's interpretation . . . ," for it would truly be impossible "by the process of judicial decision to bring about certainty in the application of the statutory generalities to the myriad kinds of business arrangements." Dodd concluded that the Court's main job was to determine how closely related to commerce or production the jobs were. He granted that the Court had "a wide range of choice" in such a course.[5]

5. Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945,* 59 HARV. L. REV. 321 (1946); for other comment on this point see Malcolm W. Davisson, *Coverage of the Fair Labor Standards Act,* 43 MICH. L. REV. 867 (1945).

Warren-Bradshaw Drilling Co. v. Hall.[6] The *Kirschbaum* opinion, indicating that each case must be decided individually, naturally gave rise to a host of other cases in which employees sought the coverage of the FLSA. Not all of them reached the Supreme Court, however. The Warren-Bradshaw company was engaged in drilling oil wells under contract, to a depth short of the oil stratum, the wells then being brought in by other drillers. Its work was all done in Texas, but of course the products of the wells moved in interstate commerce. The company employees, seeking the protection of the statute, sued for recovery of overtime pay, and the District, Circuit and Supreme Courts all granted them the relief sought.

The opinion of Justice Murphy for the Supreme Court majority held that the work was obviously necessary to production: oil can only be reached by drilling, and therefore drilling bears a "close and immediate tie" to production.

Justice Roberts, dissenting (as he had in *Kirschbaum*), saw the majority in an "extravagant" application of the statute. He thought that Congress neither intended nor had the power to reach "purely local activity, on the pretext that everything everybody does is a contributing cause to the existence of commerce. . . ."

If anything, given Frankfurter's rule of construction, this case seems clearer than the *Kirschbaum* case, Justice Roberts to the contrary notwithstanding. While it is hardly conceivable that manufacturing can be carried on without building maintenance, it is even less conceivable that oil can be procured without drilling. Still, Roberts' conception of commerce was more realistic than Frankfurter's. He conceded that if the act were interpreted logically it would reach almost any business that was not specifically excluded, whereas Frankfurter was trying to draw a line where there is no economic distinction or even a guide from Congress! But Roberts felt fundamentally that the FLSA, at least in Section 3 (j), was unconstitutional, so that he was deprived of the opportunity to pursue realism.

Walton v. Southern Package Co.[7] held that night watchmen had a "close and immediate tie with the process of production" and thus were

6. 317 U.S. 88 (1942).
7. 320 U.S. 540 (1944).

covered by the act. In a brief opinion, Justice Black did nothing more than state the facts and the holding.

Tennessee Iron v. Muscoda[8] seems to have announced the unique doctrine that the time spent by miners travelling under ground is covered since such travel is necessary to production. This was unique not in its logic, which is impeccable, but in its extreme application. Only five justices could be brought to agree on it.

Armour and Company v. Wantock[9] held that firemen, privately employed by meat packers in the Chicago stockyards district, were covered by the FLSA. Mr. Justice Jackson refused to limit the meaning of "necessary" to "indispensable," "essential," or "vital," preferring the old ruling of *McCulloch v. Maryland* on the word. "What is required," he said, "is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods."

This is a line which was followed in some succeeding cases. It is no easier to apply than "tenuous," although it seems at first glance to be a more definite criterion. It was an expression of the tendency to construe necessity liberally. As Jackson said, the Court would not assume that a company is spending money for a job as a "mere hobby or an extravagence. . . . An occupation is not . . . excluded merely because it contributes to economy or to continuity of production rather than to volume. . . ." In other words, the Court would generally if not unvaryingly assume that an occupation would not be performed unless it was considered necessary in the sense of convenient or proper.

Borden Company v. Borella[10] involved building maintenance workers doing the same sort of work as those in the *Kirschbaum* case. However, here the building was owned by the occupant and used only by the owner, as an office building. No actual production took place in the building. Justice Murphy, speaking for a 7-2 majority in holding the employees covered by the FLSA, called the central office "the heart of the industrial empire," controlling every "step of the manufacturing

8. Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944). The court's opinion was written by Mr. Justice Murphy.
9. 323 U.S. 126 (1944).
10. 325 U.S. 679 (1945).

processes." Economic production, he said "requires planning and control as well as manual labor."

Chief Justice Stone's dissent[11] called the majority argument a philosophical one; he maintained that its philosophy was not the actual basis for the coverage of the act, which he thought was intended to apply only to production as a physical process. He called the building maintenance work "no more necessary . . . than the services of the cook who prepares the meals of the president of the company . . . ;" both are "too remote from the physical process of production to be . . . in any practical sense, a part of or necessary to it."

10 East 40th Street Building v. Callus[12] saw the Court handing down its only decision adverse to employees. The employees were those of a building company—as in *Kirschbaum*—but the building was occupied neither by the owner nor by any single tenant. It was an office building with space rented to many occupants, some of whom were not connected with interstate commerce, while others maintained offices in the building as a part of an interstate business.

The majority opinion by Justice Frankfurter recalled the *Kirschbaum* case, and reiterated that these decisions involved the courts in an "empiric process of drawing lines from case to case, and inevitably nice lines." He then stated that even indispensability did not necessarily bring an occupation under the coverage of the act. After pulling up this idea from that limbo from which legal ideas seem often to spring, he continued that, although the maintenance of the building might be "indispensable," it was too far "removed from the physical process of . . . production" and was therefore "insulated" from the FLSA. To put such employees under the act was, he said, "to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Lines," he concluded, "are not the worse for being narrow if they are drawn on rational considerations."

Justice Murphy, speaking for four dissenting judges,[13] said that as far as that portion of the offices engaged in interstate business was concerned, the case was "indistinguishable" from the *Borden* case. "The

11. *Id.* at p. 685.
12. 325 U.S. 578 (1945).
13. *Id.* at p. 585.

crucial problem . . . is to determine whether such activities constitute an integral part of the productive process." To understand the direct relation between management and production, he continued, called for no "attenuated analysis," and Congress did not mean to limit the act's application to workers directly necessary to the physical manufacturing aspects of production.

This case, taken together with the *Kirschbaum* and *Borden* cases, illustrates that lines drawn in defining necessity were indeed narrow. A mind untrained in legal hair-splitting would see no essential difference between the three cases. Justice Murphy's criticism of the application in this case of "some nebulous 'common understanding of what is local business' " seems amply justified. The effect of such exercises in semantics will be touched on later.

Roland Electrical Company v. Walling[14] involved electrical mechanics working for a firm which principally engaged in electrical wiring and repair work on motors and generators used in industrial plants in the Baltimore area. Most of the plants were engaged in interstate commerce, but the wiring company was not. In a unanimous opinion, Justice Burton held the employees covered by the act, saying that the necessity of such motors in industry was well known, and that therefore services designed to keep such equipment in continuous working order were necessary.

Martino v. Michigan Window Cleaning Company[15] saw perhaps the most extreme application of the necessity clause. It concerned workers of a window-washing company which operated principally under contract to Detroit area industrial plants producing for interstate commerce. The Court was once more unanimous, and Justice Burton's brief opinion said merely that the fact that the work was done under contract rather than by the plants themselves made no difference so long as the work was necessary.

D. A. Schulte v. Gangi[16] again involved maintenance employees of a loft building rented to various concerns, all engaged in the garment trade. In this case none of the goods produced in the building was sold directly in interstate commerce. Instead the products were sold to New York

14. 326 U.S. 657 (1946).
15. 327 U.S. 173 (1946).
16. 328 U.S. 108 (1946).

garment companies, which added them as part of their lines of goods or in some cases put them on their garments. Naturally these goods eventually found their way into interstate commerce.

In a 5-3 decision, Justice Jackson not sitting, Justice Reed spoke for the majority, holding in favor of the FLSA's coverage. The mere fact that the goods produced in the building were not sold by the producing companies directly into interstate commerce, he said, was immaterial.

> "Mere separation of the economic processes of production for commerce between different industrial units, even without any degree of common ownership does not destroy the continuity of production for commerce. Producers may be held to know the usual routes for distribution of their products."

In possibly the briefest opinion Justice Frankfurter has ever written, and one so cryptic as to be almost meaningless unless one is familiar with the previous cases (and possibly even then), he dissented for himself, Justice Burton, and (posthumously) Chief Justice Stone.[17]

> "For purposes of judicial enforcement, the "policy" of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air. Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress. To that end, some responsibility at least for a broad hint, if not for explicitness, should be left with Congress."

If Frankfurter's inspired bit of pedantry meant anything, it was probably an accusation that the majority was writing the law—that is, carrying it beyond the intentions of Congress. Since five justices did not agree with him, however, it is obvious that the trouble was not basically with the Court, but with the vague terms of the statute. Frankfurter's severe castigation of the majority seems rather odd in view of his own statements in the earlier cases. If the distinctions were as "tenuous" and the lines to be drawn as "nice" as he had said, the difficulty of decision would seem to have dictated a little less dogmatism in dissent. There is really no difference in economic effect, as Justice Reed pointed out, between production *by* the company which is in interstate com-

17. *Id.*, at p. 121.

merce (as in *Kirschbaum*), and production *for* companies engaged in interstate commerce. To draw lines on the basis of such distinctions surely is not economic realism.

Farmers' Reservoir and Irrigation Company v. McComb[18] illustrates strikingly the complexities and uncertainties of statutory construction, when many clauses and many pressures have resulted in seeming inconsistencies. While this discussion concerns only one statute, the situation and the resulting dilemma are typical. The case centered on the question whether field and office employees of a farmers' cooperative irrigation project were "necessary to the production of goods for commerce." The complexity resulted from that fact that, in another section FLSA exempts agriculture and those "employed in agriculture" from its coverage. Were the irrigation employees employed in agriculture? The Court thought not, 8-1; such workers were "necessary to the production" of agricultural goods but were not themselves in agriculture.

Justice Jackson dissented in his familiar pungent style, on the grounds that the act intended to exempt everything "connected with farming."[19]

> ". . . here the Court tells us that the real solution of this dilemma is "to be" and "not to be" at the same time. While this is a unique contribution to the literature of statutory construction, I can only regret the loss to the literature of the drama that this possibility was overlooked by the Board of Avon. It will probably be as great a surprise to the proponents of agricultural exemption as it would have been to Shakespeare, had it been suggested to him."

II.

It is my contention that the Court, in such cases as those cited, was attempting to define the undefinable; further, that part of the difficulty was brought on by the Court itself, in taking it upon itself to draw lines which Congress had not asked it to draw.

If this course had been pursued, it would through logical progression have ended by including almost every profession and occupation. The effort of part of the Court to interpose a barrier between "purely local"

18. 337 U.S. 755 (1949).
19. *Id.* at p. 772.

activities "reserved to the states," and those covered by the FLSA, would inevitably have been futile.

Justice Frankfurter inveighed against judicial legislation which results in "retrospective expansion of meaning."[20] Being somewhat conservative, as conservatives go on the Court nowadays, he neglected to mention the possibility of retrospective *constriction* of meaning, which seems here to be involved, and which has in the past damaged Court prestige and often been over-ruled by later events. However, as we shall see, Congress in this instance agreed with the restriction of meaning for which Frankfurter stood; whether it can actually be accomplished is another matter.

Opinion is not unanimous that Congress' intent was actually what Frankfurter said it was. E. Merrick Dodd and Malcolm Davisson, after examining the Congressional proceedings, conclude that Frankfurter was correct.[21] However, the *Indiana Law Journal* claimed that Frankfurter "edited the legislative history . . . in favor of strict construction."

> "The tenor of Senate debate and the preliminary declaration of policy by Congress, alone, point toward a liberal construction of the statute. [The Court is placing unwarranted restrictions on the development of the act, which] if followed consistently will ultimately bring about the same incongruous result as did similar decisions under the Federal Employers' Liability Act."[22]

While the weight of authority seems to favor Frankfurter's course, it is fairly clear that the Court, if it had wished, could (but should it?) have interpreted Congressional intentions as going as far as Congressional power. Certainly nothing in the wording of the statute implies otherwise. Had the Court liberally construed the Statute, a good deal of unnecessary litigation might have been avoided.

There is substantial agreement that the course actually followed by the Court could not, in the end, limit the scope of the act appreciably. The Court was needlessly exorcised over, not whether an occupation was "necessary," but over *how necessary* it was. Perhaps even Justice Roberts would agree that well-drilling is necessary to oil production,

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20. In Kirschbaum v. Walling, 316 U.S. 517, 522 (1942).
21. *Supra*, n. 5.
22. Note, *Scope of the Fair Labor Standards Act*, 19 IND. L. J. 155 (1944).

but the doctrine of the *Kirschbaum* case made mere necessity insufficient. Thus the question in the succeeding cases was not merely "is it necessary?" but "how necessary is it?"—a question which, I submit, was unanswerable in terms of modern business practices. We thus found ourselves once again involved in the same old game of judicial hide-and-seek: is the relation to production solid or "tenuous;" is the necessity direct, indirect, or indirectly indirect; is it "close and immediate" or "remote."

This sort of play-with-words seems to sit oddly on the same Court which so enthusiastically tore down a quite similar structure in 1937, and the conclusion therefore seems inescapable that the liberal Court of the 1940's was as enmeshed in the interpolation of its economic ideas in the FLSA as its predecessors were in putting theirs into the Constitution. But a larger view of Court history and the limitations of human beings (even Supreme Court justices) forces one to speculate whether the whole experience here surveyed is but an illustration of the apparently inherent nature of the judicial process. This point seems rather obvious when one is thinking of constitutional interpretation, but has not so often been remarked on the subject of statutory construction.

But necessity remains necessity; eventually, it would seem, the Court's own logic and the logic of economics would have forced it to the position it could have assumed from the start: that "necessary" means "necessary", not "directly necessary," and that Congress did not reserve any powers to the states—certainly not explicitly and possibly not implicity. The Court would (one felt) have eventually learned that Congress, if it does not always say exactly what it means, does usually mean what it says. If the Congress does not like a liberal interpretation of a statute by the courts, or if states or pressure groups can bring enough pressure to bear, the statute may always be amended to limit its application. Such limits should be imposed by Congress; limitation based on fancied meanings or imagined intent is not the duty of the courts in this field any more than in the constitutional field.

The eventual judicial extension of the coverage of the act thus seemed probable, as several writers and even court justices foresaw. Richard Fricke, for instance, concluded that definition in the Court's manner was an impossibility, and that logic would drive the Court to extend the law to almost everyone.[23] Richard Stevens bewailed the fact

23. 31 CORNELL L. Q. 376 (1946).

that the law would bring "every industry, profession, and occupation under the regulatory powers of Congress.[24] Another writer, agreeing with Frankfurter's interpretation of the intent of Congress, nevertheless conceded that such an interpretation did not accomplish much in the way of limiting the act's coverage.

> It is an obvious fact that in a modern complex society every individual is to a degree "necessary" to every activity that is carried on. . . . If these employees [in the *Kirschbaum* case] do not have only "the most tenuous relation" to the production of goods, it is difficult to imagine any workers who could occupy such a position.[25]

Finally, Chief Justice Stone's dissent in the *Borden* case took a similarly dim view of the effects of the majority course. Unfortunately, the Chief Justice was unable to present any alternative.

> No doubt there are philosophers who would argue, what is implicit in the decision now rendered, that in a complex modern society there is such interdependence of its members that the activities of most of them are necessary to the activities of most others.[26]

Application of the word "necessary" to the productive process thus seemed to be truly a venture on a search for the first link in the causal chain, and it seemed impossible to stop until this first link was reached.

III.

At this vital juncture, however, Congress did take a hand. Apparently either the Court had been too liberal or the temper of Congress had become more conservative (or both), for the amendment to Section 3(j) of the Fair Labor Standards Act passed in 1949 was an obvious attempt by the legislature not only to clarify the law and thus help the courts, but also to limit the application of the act. The new wording substituted for "necessary" the following phraseology:

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24. Stevens, *Interstate Commerce and Production Under the Wages and Hours Law*, 13 KAN. BAR J. (1947).
25. Note, 21 CHI-KENT L. REV. 103 (1942).
26. Borden v. Borella, 325 U.S. 679, 685 (1945).

> . . . for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . *in any closely related process or occupation directly* essential to the production [of goods for interstate commerce], in any State.[27]

What do these new words imply? Is the new wording any clearer or easier of definition than that previously employed? Since no cases have yet reached the Supreme Court on this question, we must turn to lower court decisions for some clue as to the action the high court might take.

In the few cases so far decided by the federal courts, it has uniformly been held (not very surprisingly) that the *Kirschbaum* case still stands as a precedent. Apparently the amendment of 1949 borrowed its concepts directly from the Frankfurter opinion in *Kirschbaum*. Consequently, its effect as a limitation on the coverage of the act is palpably negligible. A review of the legislative history of the amendment sheds little light, but if anything indicates that Congress was very vague in its ideas of just what, specifically, the amendment was intended to accomplish, beyond the barring of the Murphy interpretation and the acceptance of the Frankfurter conception of Section 3 (j).

In the Senate, it was claimed in the report from the conference committee recommending passage of the amendment,[28] the intention was "to provide a more specific guide than does the word 'necessary.'" It was stated that the amendment "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage"—an apparent reference to the *Kirschbaum* case and those cases which followed its rule.[29]

The Senate report further said that the amendment did not "require that the activities be indispensable to production," rather that it contemplated "activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfying manner of operations which are part of an integrated effort for the production of goods. Such directly essential activities are to be distinguished from those which are only indirectly

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27. 52 STAT. 1060, 29 U.S.C.A. § 203(j) (1938), as amended.
28. 95 CONG. REC. 14868-14881 (Oct. 18, 1949). Especially at p. 14874.
29. *Id.* at p. 14874.

essential to production, such as the procurement of land for a new factory or the manufacture of brick for its buildings."[30]

The report cited specifically and favorably all the cases reviewed above except four: the *Warren-Bradshaw, Michigan Window, Gangi* and *Farmer's Reservoir* cases, and further stated that such specific businesses as production of tools and dies, fuel, power and water, and industrial laundry work, would be covered.[31] No cases were specifically mentioned as targets of the amendment, but another amendment[32] passed at the same time did exempt irrigation workers in non-profit companies, thus implying that the other three cases not favorably mentioned were to stand.

Senator Taft of the minority appended an objection to the committee report, in which he claimed that the conferees had understood something not stated in the report: that the amendment "was intended to have a substantially limiting effect upon the coverage of the Act as heretofore interpreted by both the Administrator and the courts."[33] This apparently referred to such cases as *Gangi* and *Michigan Window.*

The House report[34] specifically objected to several lower court applications of the earlier section, and also stated that such Supreme Court cases as *Michigan Window* were reversed by the amendment.[35]

Thus it seems clear that the amendment was intended to make impossible the coverage of the act in only two specific cases from the Supreme Court—the *Michigan Window* and *Farmer's Reservoir* cases—in addition to several applications by lower courts.

Indicative of the basic uncertainty of Congress (reflected, as we shall see, in the courts) as to just what was accomplished by the new wording was a colloquy between Representatives McConnell (presenting the House report) and Javits, in which it was agreed that "directly essential" means something more than "indispensable" and something less than

30. *Ibid.*
31. *Id.* at pp. 14874-5.
32. See *Id.* at p. 14878.
33. *Id.* at p. 14880.
34. 95 CONG. REC. 14925 *ff.* (Oct. 18, 1949).
35. *Id.* at p. 14928. Also mentioned were McComb v. Deibert, 16 LAB. CAS. ¶ 64,982; McComb v. Factory Stores, 81 F. Supp. 403 (N. D. Ohio 1948); McComb v. Super A Fertilizer Works, 165 F.2d 824 (1st Cir. 1948); Schroeder v. Clifton, 153 F.2d 385 (10th Cir. 1946); 1944-5 WAGES-HOURS MANUAL 125, 138; 3 CCH LAB. LAW REP., (4th ed.). ¶ 25, 150.385.

"necessary."[36] The writer's office dictionary does little to make this distinction meaningful: "indispensable" means something that "cannot be dispensed with; necessary." And "necessary" means "indispensable, requisite," etc. "Essential" is defined as "of, constituting, a thing's essence; indispensable."[37]

It thus appears that the *aim* of the amendment was to approve Frankfurter's version of the meaning of Section 3(j) and disapprove the more extreme interpretations used, for instance, in the *Gangi* case. Insofar, then, as the legislative *history* and *intent* are considered by the courts, some slight limitation on the coverage of the section may have been accomplished. If, however, the courts look only at the *words* of the amendment, it is difficult to see how the situation was changed by it. In the following cases the federal courts have wrestled with this problem in confusion.

IV.

Hawkins v. E. I. DuPont de Nemours and Co.,[38] decided in 1951, concerned cafeteria employees in a DuPont factory. The factory, evidently engaged in defense production, did not allow its employees to leave the premises during the work day, even to eat lunch. Were the cafeteria workers "directly essential" to the production of goods for commerce? The Circuit Court thought so, in a unanimous opinion relying mostly on the directives of the Administrator of the Wages and Hours Division. Little was said in elucidation of the phrase.

Tobin v. Promersberger,[39] in 1952, involved cooks, clerks, barn bosses and other service employees in a logging camp. Judge Nordbye of the District Court ruled that such employees were covered by the FLSA. He even said that the workers would have been covered before the 1949 amendment, and that the amendment itself produced no changes worthy of note. "The legislative history," he said, "aptly shows that the principle of *Kirschbaum v. Walling* . . . was not destroyed by the amendment."

Durkin v. Joyce Agency[40] was a 1953 case in which bookkeepers,

36. 95 CONG. REC. 14936 (Oct. 18, 1949).
37. THE CONCISE OXFORD DICTIONARY.
38. 192 F.2d 294 (4th Cir. 1951).
39. 104 F. Supp. 314 (D. Minn. 1952).
40. 110 F. Supp. 918 (N. D. Ill. 1953).

clerks, switchboard operators and other employees of the Joyce Agency were held covered by the act. The agency, working under contract, furnished watchmen and guards for various businesses in the Chicago area—in this case the Goldblatt Brothers department stores, which happen to be an interstate chain. Judge Perry of the District Court repeated the views of the *Promersberger* case: "The legislative history of the amendment clearly indicates that there was no intention to overturn the existing law." And, he pointed out, "The amendment is expressed in the language of the *Kirschbaum* case."

Section 3 (j) as amended, then, is now held to mean essentially what the Supreme Court said it meant before its amendment. For practical purposes the amendment may as well not have been passed, and the search down the causal chain must continue.[41]

V.

Is there anything instructive to be learned about the process of statutory interpretation by courts from the foregoing history? Without attempting to generalize from the study of a particular statute, one may yet hazard a few conclusions.

First and most obvious is the conclusion that statutory language is not self-defining or even reasonably clear. It requires interpretation; and interpretation implies discretion. This is only to a small extent a problem of legislative draftmanship. The basic problem is that human language is simply not unambiguous, no matter how careful the draftsmen may be. This difficulty is compounded by the complexity of modern civilization. The situations to be dealt with by such a statute as the Fair Labor Standards Act include the whole complex of the American economy; the complicated area thus involved is reflected in the complicated nature of the statute itself. It is simply not reasonable to expect Congress to be so clear that no doubt is left as to the meaning of the law.

Second, the cases reviewed illustrate a factor not often noted in the American political system. It has been often remarked that court interpretation determines the meaning *in practice* of laws—a point here amply

41. For other comment on the meaning of the amended provision, see Tyson, *The Fair Labor Standards Act of 1938*, I LABOR LAW J. 278 (1950); Smethurst and Haslan, *The Fair Labor Standards Amendments of 1949*, 18 GEO. WASH. L. REV. 127 (1950).

brought out. But it has not often been pointed out that the interpretations *provided* by courts may strongly influence the future attitudes of legislators toward the law. The experience with the FLSA indicates that the history of the judicial application of a law is a strong factor in the later actions of legislatures, even short of the drastic remedy of repeal of the law. It is also instructive to note that the amendment discussed above was intended at least partially to settle a dispute *within the Court itself* by taking the matter out of its hands, thus preventing a solution which Congress would not like. Congress acted in order to prevent the dominance on the Court of the more extreme interpretation of what is necessary to production for commerce. Its success in this attempt is certainly problematical, but its motive was clear.

Third, one may infer from the amendment process the power of some interest groups in Congress. It has been noted that, rather than leaving it to the hazards of court interpretation, Congress *specifically* amended the act so as to reverse the *Farmers' Reservoir* case, by exempting the employees which that case held to be covered. Obviously this was a result of farm pressures on Congress. Other exemptions were added at the same time, probably for much the same reason. Congress, it seems, is more accessible to the views and influence of interest groups than are the courts.

Fourth, the obvious confusion in Congress as to the real meaning of Section 3(j) even after amendment seems likely to be reflected in a good deal of judicial confusion too. There is much doubt whether the amendment clarified the true meaning of the section at all. Such confusion, inevitable though it be, leaves the courts (and administrators) even more free than they would ordinarily be to give varied meanings to the law, since even the legislative intent is unclear. It might almost be said that the courts have been forced to *write* Section 3(j). The author is not at this time in a position to say whether this is typical of statutory interpretation, though he is willing to guess that it is not unusual.

In summary, we see from this experience a rather complex interaction between the legislature, administrators, judiciary and interest groups; an interaction which is often neglected by public law students.